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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GEICO GENERAL INSURANCE COMPANY, Plaintiff and Respondent, v. DAVID SCHROEDER et al., Defendants and Appellants.	D068203 (Super. Ct. No. 37-2014-00039142-CU-PA-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Earl H. Maas III, Judge. Affirmed.

Law Offices of Patrick B. Conkey, Patrick B. Conkey; Law Office of Steven Schorr and Steven Schorr for Defendants and Appellants.

Colman MacDonald Law Group, Michele L. Levinson; Law Office of Marvin P. Velastegui and Marvin P. Velastegui for Plaintiff and Respondent.

David Schroeder and Christopher Boegeman (together Claimants) appeal a judgment entered after the trial court granted the petition of GEICO General Insurance Company (GEICO) to confirm an arbitration award in its favor. On appeal, Claimants contend the trial court erred by confirming the arbitration award because: (1) the trial court abused its discretion in granting the petition to confirm; (2) the court did not have jurisdiction to consider the petition because of the arbitrator's defective service of the arbitration decision; and (3) the arbitrator abused his discretion by not resetting the completed arbitration hearing to consider additional evidence. We are not persuaded by Claimants' contentions. The trial court complied with applicable law in granting GEICO's petition to confirm. Claimants' response to GEICO's petition was filed more than 100 days after service of the arbitration award and therefore could not serve as grounds for the trial court to vacate the arbitration award. Although Claimants now contend there was a defect in service of the award, they do not dispute they received a signed copy of the award more than 100 days before they filed their response to the petition to confirm, and do not establish any prejudice resulting from the allegedly defective service. In addition, Claimants do not establish that defective service of an arbitration award is jurisdictional in nature, depriving the trial court of jurisdiction to confirm the award. Finally, Claimants provide no authority authorizing this court to review the arbitrator's conduct, rather than the trial court's decision, de novo. Under these circumstances, the arbitration award must be confirmed, and we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

On June 30, 2013, Claimants suffered bodily injury and property damage resulting from a vehicle collision with an uninsured motorist. At the time of the accident, Claimants' vehicle (a 2007 Nissan Frontier) was insured by GEICO. The policy issued on March 31, 2013, for the period of April 1, 2013, through October 1, 2013. Schroeder was listed in the policy as the named insured and Boegeman was insured as an additional driver. The policy provided for arbitration of certain claims, in relevant part:

> "If any Insured making claim under this policy and we do not agree that he is legally entitled to recover damages under this Coverage from the owner or operator of an uninsured/underinsured motor vehicle because of bodily injury to the insured, or do not agree as to the amount payable, either party will have the right to demand arbitration." (Italics omitted.)

On issuance of Schroeder's policy, the uninsured motorist protection limits were $100,000 per person, $300,000 per occurrence. GEICO contends Claimants modified the policy on April 11, 2013, effective April 12, 2013, to reduce the coverage amounts for uninsured motorist protection to $15,000 per person, $30,000 per occurrence and to add $5,000 in medical payment benefits. GEICO issued a declaration page on April 16, 2013, addressed to Schroeder, noting an "Endorsement effective 4/12/13" describing the reduction in liability limits and addition of medical payment benefits. A premium refund of $29.60 was issued to Schroeder's credit card to reflect the reduced coverage limits. Claimants contend they never authorized or approved the coverage reductions. Claimants did, however, each cash checks from GEICO for medical payment benefits added through the April 12, 2013, endorsement.

On August 29, 2013, Claimants demanded GEICO arbitrate their uninsured motorist claim. On March 12, 2014, Claimants filed a complaint against GEICO, alleging tortious breach of contract. Parties agreed to arbitrate the disputed coverage issue, with the arbitration limited solely to the uninsured motorist coverage and per person and per occurrence limits in effect on the date of the accident. The arbitration matter was heard on June 18, 2014, and June 23, 2014, before Thomas E. Sharkey, Esq., and both parties submitted arbitration briefs and posthearing supplemental briefing. Although Schroeder did not attend the arbitration, he submitted a declaration to the arbitrator. The arbitrator considered the evidence presented by the parties, and issued a detailed, 11-page decision on July 13, 2014, finding that "uninsured motorist limits of $15,000/$30,000" were in effect on the date of the accident.

On July 18, 2014, Claimants' counsel sent an e-mail to the arbitrator attaching a request for continuance, citing Schroeder's inability to attend the hearings due to illness and demanding that Schroeder be given the opportunity to testify. Claimants' counsel offered no reason or explanation in the continuance request for his failure to request the continuance prior to, or during, either of the two hearing dates and the request did not specify any additional evidence Schroeder intended to present, other than information summarized in his June 25, 2014, declaration, which the arbitrator had already considered. On July 21, 2014, the arbitration decision was served on counsel for both parties via e-mail and United States Postal Service. On July 27, 2014, the arbitrator responded to Claimants' counsel, stating that he had received the request for continuance "after the arbitration hearing had been concluded on June 23, 2014, and after I had

reviewed all of the evidence and additional briefing submitted on July 7, 2014[,] and rendered Arbitrator's Decision on July 13, 2014." The arbitrator took no further action on the matter.

On November 10, 2014, more than 100 days after the arbitrator served the arbitration decision, GEICO served a petition to confirm the arbitration award on Claimants' counsel with a copy of the arbitration award attached. The petition was filed in the trial court on November 18, 2014, and was issued case No. 37-2014-00039142-CU-PA-NC (No. 2014-39142). Around the same time, Claimants filed an objection to the petition.[1] Claimants filed their objection in San Diego Superior Court Case No. 37-2014-00006223-CU-UM-NC (No. 2014-6223), the case in which their bad faith complaint against GEICO was pending. Judge Earl H. Maas III was assigned to both cases on November 18, 2014. The court closed case No. 2014-39142 sometime thereafter, and then reopened it on December 10, 2014, in response to an *ex parte* application brought by GEICO.[2] On the same date, the court set a hearing on GEICO's petition to confirm arbitration for February 13, 2015.

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1 Claimants' objection has a stamped "Filed" date that appears to be November 10, 2014, but signatures on the objection and supporting declarations are all dated November 17, 2014, and the service date is stated as November 19, 2014, thus the true filing date is unclear.

2 Claimants asks us to augment the record to include the December 10, 2014, minute order of Judge Mass in case No. 2014-6223. We treat their request as one for judicial notice and grant judicial notice of the minute order in the related case under Evidence Code section 452, subdivision (d), as relevant to the procedural history of this case. (See *Koch v. Rodlin Enterprises* (1990) 223 Cal.App.3d 1591, 1593, fn. 1 [taking judicial notice of records in a related case critical to the procedural history of the action].)

On December 22, 2014, Claimants filed a motion for sanctions against GEICO in case No. 2014-6223, claiming that GEICO's petition to confirm the arbitration award was frivolous. Judge Maas denied Claimants' motion for sanctions on February 13, 2015, without ruling on GEICO's petition to confirm. Thereafter, on March 20, 2015, GEICO filed a second petition to confirm the arbitration award in case No. 2014-39142. On March 27, 2015, Claimants filed an opposition to GEICO's petition, but again filed it in case No. 2014-6223, noting case No. 2014-39142 as a "Related Case." The memorandum of points and authorities and declarations supporting the opposition were filed on April 1, 2015, in case No. 2014-39142.

The court heard oral argument of the parties on April 17, 2015. Relying on *Eternity Investments, Inc. v. Brown* (2007) 151 Cal.App.4th 739, 742 (*Eternity Investments*), the court held that even if it deemed Claimants' opposition filed in the wrong matter as a response to the petition, because it was filed more than 100 days after the date of service of the arbitration award, it was untimely and could not be considered. The court found that GEICO alleged service of the arbitration award on July 21, 2014, and that allegation was "unchallenged" by Claimants. The court therefore granted GEICO's motion to confirm the arbitration award.

Claimants timely filed a notice of appeal.

DISCUSSION

1. *Standard of Review*

To review the trial court's judgment confirming the arbitration award, we apply Code of Civil Procedure,[3] section 1286, which requires a court to " 'confirm the award as made . . . unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding.' " (*Ikerd v. Warren T. Merrill & Sons* (1992) 9 Cal.App.4th 1833, 1841.) "Our review of an arbitration award requires us to extend to it every intendment of validity and the party claiming error has the burden of supporting his contention." (*Ibid.*) "Unless one of the enumerated grounds exists, a court may not vacate an award even if it contains a legal or factual error on its face which results in substantial injustice." (*Marsch v. Williams* (1994) 23 Cal.App.4th 238, 243-244.)

2. *Confirmation of the Arbitration Award*

Claimants contend that the trial court abused its discretion by granting the petition to confirm the arbitration award without considering Claimants' arguments for vacating the award. We disagree.

The California Arbitration Act (CAA) (§ 1280 et seq.) provides a comprehensive scheme governing the conduct of arbitration and mechanisms for challenging or confirming the resulting award. (§§ 1280-1294.2.) "Under the CAA, a trial court is limited in its review of an award." (*Eternity Investments*, *supra*, 151 Cal.App.4th at

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3 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

p. 744.) Pursuant to section 1286, on a "duly served and filed" petition of a party "the court shall confirm the award as made," unless it corrects, vacates or dismisses the award. A party may seek to vacate an arbitration award either through a petition to vacate or in response to a petition to confirm the award. (§§ 1285, 1285.2.) Regardless of the mechanism used, a request to vacate must be served and filed within 100 days of service of a signed copy of the award. (§§ 1288, 1288.2.)

Consequently, when a party does "not serve or file a *petition* or *response* to correct or vacate the award before the 100-day period expire[s]," and the opposing side files a petition to confirm more than 100 days after service of the award, it is then too late to seek "correction or vacatur." (*Eternity Investments, supra*, 151 Cal.App.4th at p. 746.) At that point, "[u]nder the plain language of the CAA, the trial court [has] no alternative but to 'confirm the award as made' notwithstanding the [Claimants'] argument that the award was invalid." (*Ibid.*) As explained in *Eternity Investments*, because a challenge to an arbitration award typically requires the trial court to make factual determinations, such "a challenge must be made soon after the award is served . . . while the evidence is fresh and witnesses are available." (*Ibid.*)

As correctly determined by the trial court, the holding in *Eternity Investments* applies here. Claimants do not dispute that they were served with a signed copy of the arbitration award on July 21, 2014.[4] The first time Claimants filed any document

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4 Although Claimants raise on appeal the issue of whether the arbitrator's service method complies with section 1283.6, they have never contended they were not sent a copy of the award on July 21, 2014, or that they did not receive it.

contesting the arbitration award (their objection to GEICO's first petition, filed in the wrong case) was on or after November 10, 2014, more than 100 days after the award was served. Claimants do not contend that filing qualified as a timely request to vacate.

On March 20, 2015, GEICO filed a second petition to confirm the arbitration award. The second petition appears to have been required because Claimants filed a motion for sanctions in response to GEICO's first petition, and the court denied the motion for sanctions, but never ruled on GEICO's first petition. Claimants filed an opposition to GEICO's second petition to confirm the arbitration award on March 27 (again in the wrong case) with supporting authority and declarations filed on April 1, 2015 (in the correct case). Both filings occurred several months after the 100-day deadline for seeking to vacate an arbitration award. Because of the untimeliness of Claimants' filing, the trial court correctly declined to consider it and acted properly in confirming the arbitration award.

3. *Defective Service of Arbitration Decision*

Claimants contend, for the first time on appeal, that their response seeking to vacate the award was not untimely because the arbitration award was defectively served. Although the timeliness of Claimants' request to vacate was raised in GEICO's petition to confirm the arbitration award and in its reply, and was before the court when it considered the petition, Claimants never raised the issue of any service defect. The record reveals no mention of the alleged defect in Claimants' lower court filings and the court's order, following oral argument, describes GEICO's allegation that the arbitration award was served on July 21, 2014, as "unchallenged" by Claimants.

" 'It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and the opposing litigant.' [Citation.] We may, however, consider a new theory 'when it is purely a matter of applying the law to undisputed facts.' " (*City of Merced v. American Motorists Ins. Co.* (2005) 126 Cal.App.4th 1316, 1327.) In contrast, "[t]he general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions." (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780.)

Claimants assert the arbitrator's method of serving the signed arbitration award by regular mail and e-mail did not comply with section 1283.6, which requires the arbitrator to "serve a signed copy of the award on each party to the arbitration personally or by registered or certified mail or as provided in the agreement." It is undisputed that the arbitration award was not personally served or sent through registered or certified mail. However, there is a factual dispute as to whether the parties' agreement governing their arbitration provided for alternative methods of service. Claimants contend "no other agreement governing the arbitration allowed for an alternative method of effectuating service." In contrast, GEICO raises arguments regarding the significance of Claimants' use of e-mail to effect service in the arbitration proceeding. Had Claimants raised this issue below, additional facts could have been developed to determine the nature and extent of any agreement between the parties with respect to service of arbitration

documents. Because Claimants' new theory involves controverted issues of fact, we find Claimants waived the argument because they did not raise it in the trial court.

In any event, even if the service of the arbitration award did not strictly comply with section 1283.6, that noncompliance does not require vacation of the award. Sections 1288 and 1288.2, establishing the time limits for moving to vacate or correct an award, do not condition the 100-day time limit on employment of the proper method of service. Instead, those sections simply require "service of a signed copy of the award" to initiate the limitations period. (§§ 1288, 1288.2.)

Moreover, minor defects in complying with the CAA do not typically preclude confirmation of an award. "In view of the strong public policy in favor of arbitration as a means of resolving disputes, the courts have consistently limited judicial interference to the minimum consistent with due process, fundamental fairness, and applicable statutory law in order to promote as much as possible the finality and conclusiveness of awards in arbitration." (*City of Oakland v. United Public Employees* (1986) 179 Cal.App.3d 356, 363.) For example, in *Murry v. Civil Service Emp. Ins. Co.* (1967) 254 Cal.App.2d 796, the court considered the impact of failure to comply with the service requirements of section 1283.6. The court explained, "the sole function of the service of the award upon the parties to an arbitration is to give notice to them of the existence and contents of the award and this function was fully performed by the service which was made upon appellant and its counsel." (*Murry*, at p. 800.) The court further clarified "a defect in service of the award does not come within the statutory grounds upon which the court in a confirmation proceeding can and should vacate this award in view of the complete

absence of any showing of any prejudice whatsoever to appellant by reason of this irregularity." (*Ibid.*; see also *United Brotherhood of Carpenters Etc., Local 642 v. De Mello* (1972) 22 Cal.App.3d 838, 840 [affirming confirmation of arbitration award despite irregularity in signature when appellant showed no prejudice from the irregularity]; *Canadian Indem. Co. v. Ohm* (1969) 271 Cal.App.2d 703, 706-707 [affirming confirmation of arbitration award despite arbitrator's failure to comply with § 1282.2, subd. (g), requiring notice to parties of arbitrator's intent to base award on outside evidence, when appellant showed no prejudice resulting from the noncompliance].)

Claimants do not contend they did not receive a copy of the signed arbitration award on July 21, 2014 (or again when GEICO served its first petition on November 10, 2014). They also do not claim any prejudice resulting from service of the award by regular mail. Claimants did not raise the issue below; to justify their untimely filing, therefore, they must not have relied on the irregular service in deciding when to file their petition to vacate. Claimants now contend the arbitrator committed prejudicial misconduct by not allowing them to redo the arbitration proceeding to include Schroeder's testimony. However, Claimants were aware of this alleged misconduct in July 2014. Rather than properly raising the issue in a petition to vacate, they took no action until GEICO moved to confirm the award after the 100-day period had expired. Claimants participated in two trial court hearings on the issue of GEICO's petitions to confirm (first addressing Claimants' sanctions motion and second addressing GEICO's petition), without ever raising the issue. Claimants contend the court abused its

discretion by focusing on "immaterial technicalities," but it is Claimants who seek to have the trial court's decision overturned on a belatedly discovered service defect they do not claim as a cause for their filing delay. Because the arbitrator substantially complied with the CAA and Claimants suffered no prejudice as a result of any defect in service, their noncompliance with the strictly enforced 100-day limit for vacating an award bars their challenge.

4. *The Court Did Not Lack Jurisdiction to Confirm Appeal*

Claimants further contend, also for the first time on appeal, that because the arbitration award was not properly served, GEICO's petition to confirm was premature and the confirmation proceedings were therefore void for lack of jurisdiction. The law does not support this contention.

Claimants rely on *Abers v. Rohrs* (2013) 217 Cal.App.4th 1199, 1205-1206 (*Abers*), which held that a party's service of a petition to vacate by mail was insufficient to confer jurisdiction over the other party. *Abers* addressed the service of process required for a court to obtain jurisdiction over a motion to vacate — by statute, the court only acquires jurisdiction to vacate on proper service and filing. (*Ibid.*; § 1286.4 ["The court may not vacate an award unless: (a) A petition or response requesting that the award be vacated has been duly served and filed . . . ."].) In *Abers*, the petitioners had filed the petition to vacate in a new matter, but only served the opposing party by mail, when proper service of process was required for the court to obtain personal jurisdiction over the party. (*Abers*, at p. 1206.) The petitioning party argued that service by mail was sufficient pursuant to the parties' agreement, but the appellate court clarified "[t]he

obligation to serve a party with process is not coextensive with merely providing the party with *notice* of the proceeding." (*Ibid.*) The *Abers* court distinguished another case in which service on a party's attorney was held to be sufficient, because in that case the party had previously appeared and therefore fell within an exception to the CAA's strict service of process requirement for petitions to vacate. (*Id.* at pp. 1207-1208, referencing § 1290.4, subd. (b)(1).)

Claimants do not dispute GEICO's proper service and filing of the petition to confirm the arbitration award. Pursuant to section 1286, if the petition is "duly served and filed" the court "shall confirm the award as made" unless it takes other action. (§ 1286.) The court therefore had jurisdiction to consider GEICO's petition. This is in contrast to the petition to vacate at issue in *Abers*, in which the governing statute precluded court jurisdiction ("[t]he court may not vacate") unless the petition was "duly served and filed." (§ 1286.4.) The service of process necessary to bring the parties under the personal jurisdiction of the court is distinguishable from the service of an arbitration award, which has the sole function of providing parties with notice. (See *Murry v. Civil Service Emp. Ins. Co., supra*, 254 Cal.App.2d 796, 800.) Like the appellants in *Abers*, Claimants conflate notice with service of process, but the two requirements are distinct. Any defect in the service of the arbitration award did not impact the court's jurisdiction to consider a motion to confirm and does not "render the confirmation proceedings void."

5. *Arbitrator's Abuse of Discretion in Refusing Claimants' Request to Reopen the Arbitration Proceeding*

Claimants also contend the arbitrator abused his discretion in declining to reset the completed arbitration proceedings to admit additional evidence favorable to them and urge us to vacate the arbitration award on this ground. However, Claimants provide no authority for the proposition that an appellate court may conduct a de novo review of an arbitrator's conduct. Claimants argue we "should deploy" the "safety valve" of section 1286.2, subdivision (a)(5), which "permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case." (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439.) As further explained in *Hall*, application of such a safety valve "requires that the *trial court* find that a party has been '*substantially prejudiced* by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.' " (*Ibid.*, first italics added.)

Claimants further argue that because appellate courts review de novo a trial court's order denying a request to vacate an arbitration award, we "must consider whether the *arbitrator*[] abused [his] discretion and there was substantial prejudice in denying [Claimants'] continuance motion," citing *SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1198 (*SWAB Financial*). *SWAB Financial* involves review of a trial court's order and the appellate court clarified it must "apply the substantial evidence test to the trial court's ruling to the extent it rests upon a determination of disputed factual issues." (*Id.* at p. 1196.) *SWAB Financial* does not

stand for the proposition that the appellate court must determine the disputed facts of an arbitration proceeding de novo.

Likewise, Claimants' reference to *People v. Dunn* (2012) 205 Cal.App.4th 1086, 1094 for the proposition that "[a]ppellate courts are empowered, indeed they exist, to reverse judgments tainted by such abuses of discretion" does not support our de novo review of the arbitrator's actions. As the court in *People v. Dunn* explained "[w]hether a particular incident is so prejudicial that it warrants a [do-over] 'requires a nuanced, fact-based analysis,' which is best performed by the trial court." (*Ibid.*)

The factual issues underlying any determination of whether the arbitrator had "sufficient cause" to reopen the arbitration proceeding, and the extent to which the arbitrator's refusal to do so prejudiced Claimants, require factual determinations by the trial court[5] and should have been raised in a timely petition to vacate. Claimants did not do so. Claimants cannot raise grounds to vacate the award for the first time on appeal when they did not file a timely request to vacate in the trial court. (See *Knass v. Blue Cross of California* (1991) 228 Cal.App.3d 390, 395-396; *Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exch., Inc.* (2000) 82 Cal.App.4th 648, 660.)

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5 From the record available on appeal, the cursory nature of Claimants' request for continuance, which does not identify any particular evidence Claimants sought to introduce other than Schroeder's testimony (as summarized in a declaration the arbitrator had already considered), suggests a trial court may have a difficult time finding any arbitrator misconduct under section 1286.2. It appears that none of the detailed arguments and proffers presented on appeal and in Claimants' untimely opposition were ever actually raised with the arbitrator. In any case, this issue is not for us to decide.

DISPOSITION

The judgment is affirmed. GEICO is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

Prager, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.